[COURT OF CRIMINAL APPEAL.]

1945 *Present:* **Keuneman S.P.J., Rose and Canekeratne JJ.**

THE KING *v.* APPUHAMY *et al.*

Applications 162-165—M. C. Rakwana, 41,871

Court of Criminal Appeal—Charge of murder—Several accused—Common intention—Requirements of a proper direction on—Penal Code, s. 32.

The four applicants were found guilty of murder.

On the question of common intention the directions of the trial Judge were such as to indicate that while "murderous intention" was necessary to be proved in respect of the person who was shown to have caused the death of the deceased, in the case of his associates any form of common criminal intention would suffice to render them guilty of the same offence—

Held, that the Judge should have emphasized to the Jury that, under section 32 of the Penal Code, to support the charge of murder the common intention must itself be a "murderous intention" within the meaning of section 294 of the Penal Code, and that if the common intention was something less, *e.g.*, to cause grievous hurt, the persons who shared that common intention would be only guilty of the lesser offence.

APPLICATIONS for leave to appeal against certain convictions by a Judge and Jury.

G. E. Chitty (with him *H. Wanigatunge* and *S. Mahadeva*), for the applicants.

E. H. T. Gunasekere, C.C., for the Crown.

Cur. adv. vult.

November 30, 1945. KEUNEMAN S.P.J.—

In this case five accused were indicted for the murder of Maddumage Mathes. The Jury by a majority of five to two, in the case of the first accused, and unanimously in the case of the second, third, and fourth accused, found these applicants guilty of murder. The fifth accused was unanimously acquitted.

The points which have been raised in these applications are as follows :—

(1) Crown Counsel at the commencement of the trial mentioned to the Jury a statement alleged to have been made by the deceased to Martin, but added that Martin was unwell and that if he were absent on the next date of trial the defence Counsel had no objection to the deposition of Martin in the Magistrate's Court being read. Eventually Martin was not called and his deposition was not read. What actually took place in Court in this connection is not very clear. In his charge the trial Judge says " The defending Counsel submitted that this was somewhat irregular but I held it was not. After all it is a common thing for the Crown sometimes to open evidence which it cannot prove, and I must ask you, Gentlemen, to completely put out of your minds anything you might remember of learned Crown Counsel's opening in regard to what Martin is supposed to have said. His evidence is not before us. He is not before us. And the oath you took as Jurymen makes it incumbent on you to decide this case on the evidence led in this Court and nothing else ".

It is now contended that the accused should have been entitled to call Martin or to have his deposition read, as his evidence was material for the defence. But it seems clear that no application was made to Court for either of those purposes, and we do not think the application can be allowed by us. As regards the irregularity complained of, we think the Judge's warning to the Jury was emphatic and adequate.

(2) The proof in this case was principally based on the evidence of deceased's wife, Kalinguhamy, who spoke to a statement made by the deceased to her implicating these accused as well as the fifth accused. Certain matters which were said to have cast a serious doubt upon her evidence, and also on the truth of the deceased's statement, were detailed to us, but these matters were clearly put to the Jury by the Judge and we think the Jury were entitled after weighing these matters to decide to accept the evidence.

(3) It was argued that the Jury showed a confusion of mind in that they acquitted the fifth accused and convicted the first accused whose case was not materially different. But in fact the alleged statement of the deceased referred with particularity to certain acts of the first accused in his attack on the deceased, and only generally mentioned that the fifth accused had also participated in the attack. We think it was open to the Jury to draw a distinction between these two accused and to give the benefit of a reasonable doubt to the fifth accused which they were unable to extend to the first accused. We think the fact that the Jury were divided as regards the first accused shows that they had considered his case.

(4) It was argued that the fact that the third and the fourth accused had injuries had not been adequately taken into account. It is true that the witnesses for the prosecution have given no explanation of these injuries. The third accused has offered an explanation of his injuries which, if accepted, would have exonerated him completely. But it is clear from the verdict that the story of the third accused has been rejected. The fourth accused did not enter the witness-box nor lead any evidence to show how he was injured. The evidence for the prosecution in this case showed that the accused had assaulted a number of persons in succession, and they may have received their injuries after the attack on the deceased, and even if the deceased had struck some blows on the third and fourth accused, the possibility that it was after he was attacked was not excluded. We do not think it is possible to draw any inference in this case from the fact that the third and fourth accused had injuries in the absence of evidence to explain these injuries; they have a bearing on the special defences set up by the accused, where the burden lay on them.

(5) It was argued that the Judge's charge was misleading on the question of common intention. The Judge read section 32 of the Penal Code to the Jury and gave a simple example. He then warned the Jury that mere presence at the scene of an offence was not evidence of common intention. He then went on to say "If you are satisfied that these accused got together and did an act which is criminal with a common intention, then regardless of the individual parts taken by these persons they are each responsible for the result produced".

Later the Judge said "you must hold the assailant or assailants who were actuated either by a common intention or a murderous intention guilty of murder". And he continued "Has the prosecution satisfied you that these five accused, acting with a common intention as I have defined it, or any one or more of them, actuated by a murderous intention, caused the death of the deceased man?"

At the end of his charge the Judge came back to this matter and said "You will have to see . . . . whether the first, second, third, fourth, and fifth accused took part in the transaction which culminated in his death, and if so whether they were actuated either by a common intention in the sense in which I have explained to you, or with a murderous intention".

It has been urged, we think with justice, that the Judge has not indicated to the Jury that the common intention must be a " murderous intention ", and that the Jury may have been led to think that any form of common criminal intention was sufficient to bring home the charge of murder to the accused. Undoubtedly the language used may be taken to indicate that, while " murderous intention " was necessary to be proved in respect of the person who was shown to have caused the death, in the case of his associates any form of common criminal intention would suffice to render them guilty of the same offence. The Judge has not emphasised to the Jury that under section 32 of the Penal Code, to support the charge of murder the common intention must itself be a " murderous intention" within the meaning of section 294, and that if the common intention was something less *e.g.*, to cause grievous hurt, the persons who shared that common intention were only guilty of the lesser offence.

We accordingly think that the verdict of Guilty of Murder entered in this case cannot be supported. We think the Jury have come to the conclusion that the four accused participated in the attack on the deceased man Mathes and that they were actuated by a common criminal intention. Crown Counsel has argued that the case, at any rate of the second accused, may be treated on a special footing, and that the deceased's statement—as given by his wife, Kalinguhamy—indicated that the fatal injury was inflicted by the second accused, and that there was further evidence that at a stage after the deceased had been assaulted and knocked down the second accused came back to the deceased and struck him on the leg with a katty and said " This fellow is not yet dead ". Had the Jury acted upon this evidence it would have been difficult for us to interfere with the verdict of murder as against the second accused. But it appears to us, and the Crown Counsel does not dispute this, that the Jury may have acted merely on their conviction that the four accused participated in the assault on the deceased, and were actuated by a common criminal intention, without definitely deciding what acts had been done by each of them, and we think we must deal with the second accused on the same footing as the other accused.

We have carefully considered the evidence and come to the conclusion that, had the Jury been correctly instructed, they would at least have found in this case that all these accused were actuated by a common intention, to cause grievous hurt.

We accordingly set aside the verdicts of murder entered against these four accused, and substitute in their place verdicts against each of them of voluntarily causing grievous hurt by dangerous weapons under section 317. We impose on each of these accused a sentence of seven years' rigorous imprisonment.

Verdicts altered.